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No. 91-922

In The

Supreme Court of the United States

October Term, 1991

THE STROH BREWERY COMPANY,

Petitioner,

v.

DIRECTOR OF THE NEW MEXICO DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, et al.,

Respondents.

Petition For A Writ Of Certiorari To The Supreme Court Of The State Of New Mexico

SUPPLEMENTAL BRIEF IN OPPOSITION OF RESPONDENT DIRECTOR OF THE NEW MEXICO DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL

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REASON FOR SUPPLEMENTAL BRIEF

In its reply to briefs in opposition (Stroh Reply), Stroh refers this Court to a case decided on January 22, 1992, entitled *Wyoming v. Oklahoma*, 60 U.S.L.W. 4119 (U.S. Jan. 22, 1992). On January 22, director's brief in opposition had been printed. It was mailed for filing and service on January 23, 1992. Because of these circumstances, director respectfully suggests that the above decision was not then "available" within the meaning of Supreme Court Rule 15.7 and that this supplemental brief

is therefore filed in accord with that unavailability and also in compliance with the rule.

ARGUMENT

THIS COURT'S RECENT DECISION IN WYOMING v. OKLAHOMA SUPPORTS DIRECTOR'S POSITION THAT THE DISMISSAL OF STROH'S 1984 APPEAL IS THE LAW OF THE CASE IN THIS COURT

Director does not and has never taken the position that this Court's law of the case doctrine forbids review of its earlier decisions, as Stroh incorrectly implies. Stroh Reply 2, 3. The crucial question in a law of the case situation is not whether a court may review and change a previous ruling, but whether it *should*. This Court's decision in *Wyoming v. Oklahoma*, 60 U.S.L.W. 4119 (U.S. Jan. 22, 1992) ("*Wyoming*") supports the proposition that the United States Supreme Court applies its own law of the case bar, except when exceptional circumstances exist mandating otherwise.

Wyoming was brought under this Court's original jurisdiction. The State of Wyoming sought a declaration that Oklahoma's legislation requiring its coal-fired electric utilities to burn ten percent (10%) Oklahoma coal was unconstitutional and also sought an injunction forbidding enforcement of the legislation. Oklahoma objected to Wyoming's motion for leave to file its bill of complaint on grounds of lack of standing and lack of jurisdiction. This Court allowed the complaint's filing over the objections and thereafter denied Oklahoma's motion to dismiss based on the same arguments.

The law of the case issue arose when this Court passed on the parties' cross motions for summary judgment (which again raised the standing and jurisdiction issues) and the Special Master's Report related to the motions. The Special Master recommended that the Court reject Oklahoma's third attack on the standing issue. *Wyoming*, 60 U.S.L.W. at 4120. In discussion, Justice White and the majority stated that the Court had "been reluctant to import wholesale law of the case principles into original actions, *Arizona v. California*, 460 U.S. 605, 618-619 (1983)." *Wyoming*, 60 U.S.L.W. at 4122. However, even original jurisdictional cases " 'should be subject to the general principles of finality and repose, absent changed circumstances or unforseen issues not previously litigated.' *Id.*, at 619." *Wyoming*, 60 U.S.L.W. at 4122. Conceding to itself the power to change its prior rulings, the Court nonetheless declared it would do so *only* if they had been "clearly wrong." *Wyoming*, 60 U.S.L.W. at 4122.

The Court went on to confirm the propriety of Wyoming's standing and to agree with the Special Master on the issue. *Wyoming*, 60 U.S.L.W. at 4122. The clear implication of the discussion of law of the case is that *even* when questions of jurisdiction are raised (question which the dissenters thought, if fully considered, so fundamental as to be beyond the doctrine, *Wyoming*, 60 U.S.L.W. at 4126), this Court may invoke its law of the case doctrine and allow the first decision to stand, as long as it was not "clearly wrong."

This is a powerful proposition and builds on the foundation laid in *Arizona v. California*, 460 U.S. 605 (1983) ("*Arizona*"), another case in this Court's original jurisdiction. There, in analyzing a provision allowing later

review of a prior decree adjudicating water rights among states, the Court set forth the general principles of the law of the case doctrine as encompassing and understanding that departure from the doctrine is justified only if the reviewing Court is "convinced that [the prior holding] is clearly erroneous *and* would work a manifest injustice." [emphasis supplied] *Arizona*, 460 U.S. at 618, Note 8. Justice White, again as in *Wyoming* for the majority, recognized that "a fundamental precept of common law adjudication is that an issue once determined by a competent court is conclusive." *Arizona*, 460 U.S. at 619.

These are precisely the principles that the Supreme Court of New Mexico followed in concluding from the record on appeal that Mew Mexico's law of the case bar applied and that the equities in the case below were in favor of respondents, not Stroh. Such equitable balancing is usually performed by lower courts, not by this one. In original proceedings, however, there may be a need for this Court to balance equities in the first instance and consequently a need to have the barred door of law of the case open a crack more, as the *Wyoming* decision suggested, when the earlier ruling was "clearly wrong."

Based on *Wyoming*, this Court has increased authority to invoke its law of the case bar in dismissing Stroh's petition for certiorari. This Court in 1984 dismissed Stroh's appeal "for want of [a] substantial federal question." *United States Brewers Assn., Inc. v. Rodriguez*, 465 U.S. 1093 (1984). Although the decision was summary in appearance, Justice Stevens' concurring opinion suggests more than summary review of the appeal and also points to the Court's recognition of *Joseph E. Seagram and Sons,*

Inc. v. Hostetter, 384 U.S. 35 (1966) (*"Seagram"*) and its continuing validity – 18 years after it was decided.

This Court was not "clearly wrong" when it dismissed Stroh's first appeal in 1984. *Seagram* was then "good law." Price affirmation laws were valid and in effect in New Mexico and across the country. The only record available in this case establishes and the court below found that the equities lie in favor of respondents and against Stroh, showing that a "manifest injustice" would befall respondents were the New Mexico decision to be altered. The inevitable law of the case inquiry, therefore – whether this Court should depart from the doctrine – here must be answered in the negative.

CONCLUSION

For the above and the reasons set forth in the brief in opposition, the Court should deny Stroh's petition.

Respectfully submitted,

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